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THE FEDERAL CORPORATION TAX. — In 1909, Congress imposed on every corporation organized in, or doing business in, any state of the United States, a special excise tax, with respect to doing business, equivalent to one *per centum* upon its entire net income over and above $5000.[1] The Supreme Court of the United States unanimously upheld the constitutionality of this tax. *Flint* v. *Stone Tracy Co.*, U. S. Sup. Ct., March 13, 1911.[2]

[1] The full wording of this part of the statute is: "That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories, Alaska and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed." U. S. St., 1909, ch. 6, § 38.

[2] Fifteen cases were decided under this opinion. On the same day the court held that trusts not organized under statutes but recognized at common law were not within the act, Eliot *v.* Freeman, U. S. Sup. Ct., March 13, 1911, and that a corpora-

The strongest argument against the tax was that it is a direct tax, and, not being "apportioned among the several states . . . according to their respective numbers," it contravenes Art. I, § 2, of the Constitution. No definition of "direct tax" has yet been generally accepted.[3] Capitation taxes[4] and taxes on land are unquestionably direct;[5] but the Supreme Court has never considered as direct, taxes on privileges and transactions,[6] which class includes excise taxes.[7] In 1895, it laid down the doctrine that a tax on the income from land and on the income from personal property amounts to a tax on the land and personal property itself, and is direct.[8] Both before and since this decision, however, the court has consistently held that the fact that a tax is measured by income from property does not make it direct.[9] The distinction seems a strange one,[10] but it is at least well-defined; the test is whether the tax is imposed on property solely because of its ownership.[11] Although the mere declaration in a statute that a tax is an excise does not make it so,[12] the holdings of the Supreme Court make practically everything turn on the object expressed, rather than the mode of measurement.[13] And the measure of a tax may be property which is itself non-taxable.[14]

The second great objection made to the statute was that it taxes franchises created not by the United States but by the states. The Constitution gives Congress power to lay and collect excises;[15] if affirmative justification were needed for the power to levy this kind of an excise it could be found in the facts that the federal government does give state-created corporations the benefit of its protection,[16] and that its revenue must be obtained from the same territory, property, and activities which

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tion whose sole function is to hold title to land, and to distribute its rentals, is not doing business within the meaning of the act, Zonne *v.* Minneapolis Syndicate, U. S. Sup. Ct., March 13, 1911.

[3] See 20 HARV. L. REV. 280; 24 *id.* 31; 2 THAYER, CASES ON CONSTITUTIONAL LAW, note, 1325–1327.

[4] U. S. CONST., Art. I, § 9, contains the language, "No capitation or other direct tax."

[5] See Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533, 544; JUDSON, TAXATION, 648.

[6] See Hylton *v.* United States, 3 Dall. (U. S.) 171; Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397.

[7] For definitions of "excise" see Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 592; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 680. And for a list of taxes upheld by the Supreme Court as excises, see GRAY, LIMITATIONS OF TAXING POWER, 352.

[8] Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601. Probably taxes on incomes from sources other than real or personal property would not be direct. See JUDSON, TAXATION, 652.

[9] Springer *v.* United States, 102 U. S. 586; Knowlton *v.* Moore, 178 U. S. 41; Spreckels Sugar Refining Co. *v.* McClain, *supra.*

[10] See 9 HARV. L. REV. 207; 20 *id.* 280.

[11] See Knowlton *v.* Moore, *supra*, 41, 81, 82.

[12] See Galveston, Harrisburg & San Antonio Ry. Co. *v.* Texas, 210 U. S. 217; Western Union Tel. Co. *v.* Kansas, 216 U. S. 1.

[13] See Bank Tax Case, 2 Wall. (U. S.) 200; Home Ins. Co. *v.* New York, 134 U. S. 594; Spreckels Sugar Refining Co. *v.* McClain, *supra.*

[14] Maine *v.* Grand Trunk Ry., 142 U. S. 217; Plummer *v.* Coler, 178 U. S. 115.

[15] U. S. CONST., Art. I, § 8.

[16] One of the federal Circuit Courts recently resorted to this sort of argument to sustain another form of excise tax. United States *v.* Billings, 44 N. Y. L. J. 2593, 2594.

the states tax.[17] But it is enough that there is no express constitutional limitation on this sort of thing.[18] The only implied restriction is that the federal government shall not cripple a state in the exercise of its governmental functions;[19] but corporations, even so-called public service companies, are not actual agencies of the state. Even if Congress by taxation virtually destroyed such state franchises, the courts could give no remedy.[20]

Another objection considered in the principal case was that the distinction between a business carried on by a corporation and one carried on by a partnership or individual violated the constitutional provision[21] that "all excises . . . shall be uniform throughout the United States." This clause, however, demands only geographical uniformity;[22] and, moreover, the difference between corporations and partnerships is a substantial one.[23] The various other objections the court dismissed with little difficulty.[24]

In summary, it may be said that the case of *Flint* v. *Stone Tracy Co.* is important for two reasons: it settles a question of vast importance to business interests throughout the whole country, and to the federal, and incidentally to the state, revenue; and it establishes firmly the distinction between a tax on income from property and a tax on a privilege measured by that income. But as each link in the chain of reasoning necessary to support the tax had previously been decided by the Supreme Court, it forms no notable addition to the constitutional history of taxation.

WAIVER OF STOCKHOLDERS' LIABILITY. — In a recent case the plaintiff, relying on the representation that the shares of corporate stock had been fully paid for, purchased bonds of the corporation, each bond containing a waiver of all remedies against the stockholders. The stock had in fact been paid for with land accepted at a gross overvaluation; and, upon the corporation's becoming insolvent, this action was brought to recover the balance due on the shares. The court held the shareholders liable since the waiver was not intended to include any right arising from misrepresentation. *Downer* v. *Union Land Co.*, 129 N. W. 777 (Minn.). By the better authority a person dealing with a corporation may by express agreement waive a constitutional or statutory liability of the stockholders and agree to look only to the corporation and

[17] This was pointed out by the court in the principal case.
[18] See GRAY, LIMITATIONS OF TAXING POWER, 345.
[19] See South Carolina *v.* United States, 199 U. S. 437, 461.
[20] But *cf.* Flaherty *v.* Hanson, 215 U. S. 515.
[21] U. S. CONST., Art. I, § 8.
[22] Knowlton *v.* Moore, *supra.*
[23] See Flint *v.* Stone Tracy Co., *supra*, 563.
[24] The other objections were, in brief, as follows: that the bill did not originate in the House of Representatives; that the method of measuring the tax is arbitrary; that the $5000 limit is arbitrary; that the exception of certain associations is arbitrary; that the details of deducting interest payments by banks are arbitrary; and that the provision regarding tax returns involves unreasonable searches and seizures. The court declined to consider the objection that foreign corporations, doing a local business in a state, are not within the control of Congress for taxing purposes, as no such case was presented in the record.